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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMIASSEN EARL DRAKE,

Defendant and Appellant.

B204812

(Los Angeles County Super. Ct.
No. YA067580)

APPEAL from a judgment of the Superior Court of Los Angeles County, Eric C. Taylor, Judge. Affirmed.

Kelly M. Cronin, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jamiason Earl Drake was convicted by jury of second degree robbery in violation of Penal Code section 211.¹ The jury also found that defendant personally used a firearm in the commission of the robbery within the meaning of section 12022.53, subdivision (b). The trial court found that defendant had served a prior prison term, as defined in section 667.5, subdivision (b). Defendant was sentenced to 16 years in state prison, consisting of the upper term of five years for the robbery, enhanced by ten years for the firearm use, and one year for the prior prison term.

In this timely appeal from the judgment, defendant argues he was deprived of his Fifth Amendment right to remain silent when the trial court instructed the jury it could consider defendant's failure to explain or deny evidence against him, although defendant had not testified. We affirm the judgment.

FACTS

Armed with a .22 caliber handgun, defendant robbed Edgar Mockson, a cashier, of \$170 from the cash drawer of the register at an Arco station in Redondo Beach. The station is equipped with multiple surveillance cameras inside and outside the store, which record onto a DVD. Video of the incident, depicting defendant committing the robbery, was played for the jury.

The investigating officer, Detective David Taneman of the Redondo Beach Police Department, received a copy of the DVD depicting the robbery from the manager of the Arco station. Because the video was very clear, Detective Taneman had a flyer prepared, including a still photograph of the robber. The detective sent the flyer by e-mail to other local law enforcement agencies.

The day after he sent the e-mail, Detective Taneman received phone calls from three Hawthorne officers—Lieutenant Jim Royer, Sergeant Peter Goetz, and Officer

¹ All further statutory references are to the Penal Code.

Chaffin. All three officers were 100 percent positive that defendant was the person on the flyer. Lieutenant Royer had known defendant since defendant was 12 or 13 years old and was familiar with his family. Officer Chaffin said he knew defendant for a few years. Sergeant Goetz knew defendant from criminal investigations, arrests, and interviews. Detective Taneman received a photograph of defendant from the Hawthorne officers, compared it to the person depicted on the DVD of the robbery, and concluded defendant was the robber.

After speaking to the Hawthorne officers, Detective Taneman created a photographic lineup depicting six individuals, including defendant, which he showed to Mockson. Mockson circled defendant's photograph and said that defendant was the most likely of the six, but he could not make a positive identification from the photographs. At trial, Mockson was 100 percent sure of his in-court identification of defendant.

DISCUSSION

Defendant raises only one issue on appeal. He contends the trial court violated his Fifth Amendment right to remain silent by instructing the jury pursuant to Judicial Council of California Criminal Jury Instructions (2007-2008) CALCRIM No. 361 that it could consider defendant's failure to explain or deny evidence against him in determining guilt, because defendant did not testify.

The trial court instructed the jury on the presumption of innocence, proof beyond a reasonable doubt, and defendant's right not testify. (CALCRIM Nos. 220, 355.) The court later instructed the jury in the language of CALCRIM No. 361 as follows:

"If the defendant failed in his testimony to explain or deny evidence against him, and if he could reasonably be expected to have done so based on what he knew, you may consider his failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove each element of the crime

beyond a reasonable doubt. If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure.”

Immediately after the reading of the instruction, the trial court told the jury, “I’m sorry. Strike that. Ignore the last instruction.” CALCRIM No. 361 was not included in the complete set of written instructions provided to the jury.

There is no question the instruction should not have been given because defendant did not testify, but defendant falls far short of establishing prejudicial error. The trial court’s admonition to ignore the instruction cured any error. Moreover, if error exists, it was nonprejudicial in light of the strength of the prosecution’s case and the pertinent instructions that were given the jury.

“Jurors are presumed to follow a court’s admonitions and instructions. (*Romano v. Oklahoma* (1994) 512 U.S. 1, 13 [improper admission of evidence did not deny due process in light of the court’s jury instructions about the scope of evidence the jury was to consider]; *People v. Harris* (1994) 9 Cal.4th 407, 426.) ‘The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process.’ (*Richardson v. Marsh* (1987) 481 U.S. 200, 211 [finding no confrontation clause violation caused by the admission of a nontestifying defendant’s confession in light of the court’s limiting instruction].)” (*People v. Houston* (2005) 130 Cal.App.4th 279, 312.)

There is no reason to disregard the presumption that the jury followed the trial court’s admonition to ignore CALCRIM No. 361. The admonition was clear and to the point—it directed the jury to ignore the previously given instruction. The admonition would have necessarily made sense to the jury, since the withdrawn instruction could not apply in this case because defendant had not testified. There is certainly nothing in the record on appeal to support the notion that the jury somehow relied upon a facially inapplicable instruction it had specifically been told to ignore in reaching its verdict.

We also hold that any error was nonprejudicial. (*Chapman v. California* (1967) 386 U.S. 18, 23.) The jurors were properly instructed on the presumption of innocence, proof beyond a reasonable doubt, and a defendant's right not to testify, which advised them of the core fundamental rights applicable in a criminal action. The evidence of guilt was truly overwhelming—defendant was identified by the victim and depicted so clearly on a still photograph produced from the DVD of the incident that three peace officers were able to immediately identify him with absolute certainty. No meaningful evidence was presented to undermine the prosecution evidence, nor was any affirmative defense offered. The instruction did not affect the verdict.

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.